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Proposed Regulation Agency Background Document

Agency name	Board for Branch Pilots
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC45-20
VAC Chapter title(s)	Board for Branch Pilots Regulations
Action title	Amend Reporting Requirements
Date this document prepared	May 8, 2023 (revised October 27, 2023)

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Board for Branch Pilots Regulations provide for the licensure and regulation of branch pilots and branch pilots in accordance with the requirements of Chapter 9 (§ 54.1-900 et seq.) of Title 54.1 of the Code of Virginia. Branch Pilots are responsible for safe passage of ships in Virginia's major shipping lanes and waterways.

Mandatory drug tests are performed for initial licensure, renewal of license, extension of route, and any incident involving a vessel.

This action amends sections of the Board for Branch Pilots Regulations that (i) establish the grounds for denial of licensure, license renewal, or discipline of a licensee; and (ii) provide for random chemical testing of regulants. Section 18VAC45-20-40 is amended to provide that a regulant's performing or attempting to perform the duties of the regulant's office or job while under the influence of marijuana is grounds for denial of a license, denial of renewal of a license, or discipline of a licensee. Section

18VAC45-20-50 is amended to require that an MRO report to the licensee and to the Board for Branch Pilots any time the MRO finds the presence of marijuana that may impair the pilot from safely discharging any duty to the extent the pilot is unfit to perform those duties.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

"MRO" means Medical Review Officer.

"RRC" means regulatory review committee.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in the ORM procedures, "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Chapter 550 of the 2021 Acts of Assembly (SB 1406) eliminated criminal penalties for simple possession of marijuana and modified several other provisions of law related to marijuana. The legislation limited dissemination of criminal history record information and clarified that convictions for certain misdemeanor marijuana offenses are not to be disclosed to the agency. As a marijuana conviction was no longer a reportable offense as of July 1, 2021, the Board for Branch Pilots ("the Board") decided on September 13, 2021, to form a regulatory review committee (RRC) to review the regulations related to the reporting of positive test results from random drug testing. The Board determined that marijuana would still be reportable in random drug tests and actionable if a pilot were to test positive for marijuana.

The RRC recommended the Board amend its regulations to include the word "marijuana" in 18VAC45-20-40.16 and 18VAC45-20-50.C.4. On March 15, 2023, the Board adopted the recommendation of the RRC.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

The agency is the Board for Branch Pilots. Chapter 9 of Title 54.1 of the Code of Virginia enumerates the legal authority for the Board to administer the licensure program for branch pilots. Section 54.1-902 of the Code of Virginia states, in part:

A. The Board is authorized to promulgate regulations necessary for the proper government and regulation of pilots and to prescribe penalties for the violation of regulations in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.). Regulations may include the right to suspend or revoke the branch of any pilot.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

The General Assembly has charged the Board with the responsibility for regulating those who perform the duties of a branch pilot by requiring that such individuals obtain a license in order to perform these duties, and that such individuals adhere to minimum standards of conduct. These standards of conduct include a pilot being fit to safely discharge their piloting duties. To the extent a pilot is unfit to perform piloting, the health, safety, and welfare of the public would be at risk.

The Board determined it was imperative to ensure that marijuana was included in the testing for an incident, extension of route, initial or renewal of a license, or random test screens. A branch pilot who is impaired by any substance poses a risk to not only the commercial cargo ship the pilot is piloting, but to also, the crew, any citizens using the waterways, and the port.

The Board seeks to ensure that pilots are aware that a test positive for marijuana, could result in disciplinary action by the Board to the extent it may impair the safe discharge of the pilot's duty to pilot a vessel.

The goal of the regulatory change is to clarify that marijuana is reportable in random drug tests and the Board has a basis to take action if a pilot were to test positive for marijuana, to include denial of a license, denial of renewal of a license, or disciplinary action.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Section 18VAC45-20-40 is amended to provide that a regulant's performing or attempting to perform the duties of the regulant's office or job while under the influence of marijuana is grounds for denial of a license, denial of renewal of a license, or discipline of a licensee. Section 18VAC45-20-50 is amended to require that an MRO report to the licensee and to the Board for Branch Pilots any time the MRO finds the presence of marijuana that may impair the pilot from safely discharging any duty to the extent the pilot is unfit to perform those duties.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantages of the regulatory change are: 1) clarification to regulants and to the public that marijuana is reportable in random drug tests; and 2) the Board has a basis to take action if a pilot were to test positive for marijuana, to include denial of a license, denial of renewal of a license, or disciplinary action.

There are no disadvantages to the public or the Commonwealth.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

No state agencies will be particularly affected by this action.

Localities Particularly Affected

No localities will be particularly affected by this action.

Other Entities Particularly Affected

No other entities will be particularly affected by this action.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits) anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

The Board is amending the governing of the Branch Pilots to include marijuana in the regulations. Licensed Branch Pilots are responsible for safe passage of ships in the Commonwealth's major shipping lanes and waterways. As marijuana is no longer a reportable offense as of July 1, 2021, the board is fully confident that it must be understood that it would remain reportable in random drug tests and actionable if a branch pilot test positive for marijuana in his system during anytime. As a result, it is a cause for denial of licensure, renewal, extension of route, and may be a disciplinary action. Marijuana impairs the safe discharge of a branch pilot which affects the safety of the public, the ship, the crew, and the port thus making it a disadvantage to the agency and the Commonwealth. Licensed branch pilots will be affected

by this change and they are considered small businesses. There is no direct economic or fiscal impact to other state agencies.

All costs incurred in support of board activities and regulatory operations are paid by the Department of Professional and Occupational Regulation (DPOR) and funded through fees paid by applicants and regulants. All boards within DPOR must operate within the Code provisions of the Callahan Act (54.1-113), and the general provisions of 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. DPOR allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies. The Board has no other source of income.

Impact on State Agencies

<i>For DPOR:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	There are no savings and no changes to costs, fees, or revenues of DPOR resulting from this regulatory change
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	There are no savings and no changes to costs, fees, or revenues of other state agencies resulting from this regulatory change.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	A benefit of this regulatory change will provide safe passage of ships in the Commonwealth's major shipping lanes and waterways.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	There are no savings and no changes to costs, fees, or revenues of localities resulting from this regulatory change
Benefits the regulatory change is designed to produce.	None.

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	All licensed branch pilots will be affected by the change. No other entities are anticipated to be affected by the change
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	As of May 1, 2023, there are 38 licensed branch pilots. All applicants and licensees are small businesses that are affected by this change

<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p> <p>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</p> <p>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;</p> <p>c) fees;</p> <p>d) purchases of equipment or services; and</p> <p>e) time required to comply with the requirements.</p>	<p>a) A record keeping cost will be incurred by the branch pilots who test positive for alcohol, marijuana or any medication that be considered disciplinary action. b) There are no real estate development costs resulting from the change, c) There are no fees related to the change, d) No equipment or services are needed to be purchased from this change, and e) None.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The benefit of the regulatory change will clarify to branch pilots who drug testing is positive for marijuana that they would be denied licensure, renewal, extension of route, and will be disciplined. Thus, ensuring the safe discharge of the branch pilot, the safety to the public, the ship, the crew, and the port while protecting the health, safety, and welfare of citizens.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The General Assembly has charged the Board with the responsibility for regulating those who perform the duties of a branch pilot by requiring that such individuals obtain a license in order to perform these duties, and that such individuals adhere to minimum standards of conduct. These standards of conduct include a pilot being fit to safely discharge their piloting duties. To the extent a pilot is unfit to perform piloting, the health, safety, and welfare of the public would be at risk.

The Board determined it was imperative to ensure that marijuana was included in the testing for an incident, extension of route, initial or renewal of a license, or random test screens. A branch pilot who is impaired by any substance poses a risk to not only the commercial cargo ship he the pilot is piloting, but to also, the crew, any citizens using the waterways, and the port.

No viable alternative to the regulatory change could be identified.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing

performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

Branch pilot licenses are issued to individuals, and not to business entities. The General Assembly has charged the Board with the responsibility for regulating those who perform the duties of a branch pilot by requiring that such individuals obtain a license in order to perform these duties, and that such individuals adhere to minimum standards of conduct. These standards of conduct include a pilot being fit to safely discharge their piloting duties. To the extent a pilot is unfit to perform piloting, the health, safety, and welfare of the public would be at risk.

The Board determined it was imperative to ensure that marijuana was included in the testing for an incident, extension of route, initial or renewal of a license, or random test screens. A branch pilot who is impaired by any substance poses a risk to not only the commercial cargo ship he the pilot is piloting, but to also, the crew, any citizens using the waterways, and the port.

This action amends the reporting requirements for an MRO to include notification to a licensee and the Board when the MRO finds the presence of marijuana that may impair a pilot from safely discharging the duties of a pilot. This change appears to be the least stringent means to accomplish the Board's goal.

No viable alternative to the regulatory change could be identified. The enabling statute establishing the branch pilot licensing program provides no exemption for small business; therefore there are no such exemptions contained in the proposed change.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in EO 19 and the ORM procedures, e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable. In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This action is not being used to conduct a periodic review or small business impact review.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency's response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

There were no public comments received following the publication of the previous stage.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The Board for Branch Pilots is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>.

Comments may also be submitted by mail:

Bonnie Davis, Regulatory Operations Administrator
 Department of Professional and Occupational Regulation
 9960 Mayland Drive, Suite 400, Richmond, VA 23233

Email: branchpilots@dpor.virginia.gov / Fax: 866.465.6206

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage of this regulatory action.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between the existing VAC Chapter(s) and the proposed regulation. If the existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
20-40	N/A	This section provides for the Board’s authority to deny initial licensure, deny extension of a	Subdivision #16 of the section is revised to include marijuana as a substance for which the Board may

		<p>license, deny renewal of a license, or discipline a licensee.</p> <p>The section outlines the prohibited conduct that may be the basis for the Board to take action against a regulant. Prohibited conduct includes the performing or attempting to perform piloting duties while under the influence of alcohol or any medication (including a controlled substance) to the extent the licensee was unfit to perform duties.</p>	<p>take action if a regulant performs or attempts to perform piloting duties while under the influence.</p> <p>Adding “marijuana” clarifies to regulants and the public that a pilot could be denied a license, renewal or extension of route, and he will be disciplined if the pilot tests positive for marijuana. The Board wanted to make it clear that although Virginia eliminated the criminal penalties for marijuana, it can still impair a pilot and the pilot could be disciplined for testing positive.</p>
20-50	N/A	<p>Provides for the random chemical testing of licensees.</p> <p>Licensees are subject to random chemical testing. Such testing must be conducted at an annual testing rate of 30% and not more than 100% of licensees. Licensees are responsible for all costs of such testing. Testing must be a comprehensive drug screen acceptable to the Board and include testing for substances specified Schedules I through V of the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia). A licensee selected for testing must report for testing within two hours of notification. A licensee’s failure to take a test is considered refusal to take the test.</p> <p>The section outlines a licensee’s duties with respect to random testing. These include the requirement to participate in random testing and the requirement to report for random testing when selected.</p> <p>The section also imposes duties on a licensee related to prescriptions from a health care provider, including obtaining a statement from a health care provider regarding</p>	<p>Subdivision C 4 of the section is revised to include marijuana as a substance for which the MRO must notify the licensee and the Board when the MRO finds the presence of marijuana that may impair the safe discharge of any duty of a pilot that the pilot is unfit to perform those duties.</p>

		<p>the licensee's fitness to safely perform piloting duties when prescribed new medication, and notification to the MRO regarding prescribed medications.</p> <p>The section outlines the duties of the MRO, which include a requirement to receive, evaluate, and maintain record of each random chemical test taken by a licensee, and to report to the licensee and the Board when the MRO finds the presence of a drug or alcohol that may impair the safe discharge of any duty of a pilot such that the pilot is unfit to perform those duties.</p>	
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